Tentative Rulings for June 24, 2010
Departments 97A, 97B, 97C & 97D

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

07CECG02834 ***Rios et al. v. Ortiz et al.*** **(Dept. 97D)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

09CECG02015 ***Ovalle v. Fresno Bee*** **is continued to July 8, 2010 at 3:30 in Dept. 97A.**

09CECG01076 ***Serrano v. Selma Auto Mall, Inc.*** **(Dept. 97C) is continued to Thursday, July 29, 2010, in Dept. 97C.**

04CECG01764 ***CDF Firefighters v. Maldonado et al.*** **is continued to July 1, 2010 at 3:30 p.m. in Dept 97D.**

10CECG01230 ***JHS Family Limited v. Coinmach Corp.*** **is continued to August 24, 2010 in Dept. 97D.**

(Tentative Rulings begin at the next page)

Tentative Ruling

Re: ***Grossman v. Gage, et al***
Superior Court Case No. 09CECG01105

Hearing Date: June 24, 2010 (**Dept. 97A**)

Motion: Continued hearing on motion by Marylynne Kelts to set aside default and quash service of summons

Tentative Ruling:

To deny.

Explanation:

The court finds that the original Post Office form submitted to the court along with Sapatjian's declaration as to how it was obtained is admissible under Evid. Code §1280 and is evidence that the Post Office regularly delivered mail to Marylynne Kelts at the 2329 Oak Park Lane address as of August, 2009, the date on the Post Office stamp.

However even apart from that evidence, Kelts signed a declaration under penalty of perjury that listed her address of record as 2329 Oak Park Lane and that is still the address to which all court documents in this case are served. Though an attorney has claimed that he used that address in error, Ms. Kelts signed the declaration even though the address of service was the central issue in her motion.

And while the court's order continuing this hearing requested that Ms. Kelts provide written evidence that she filed a notice of change of address with the post office during the relevant period, her supplemental declaration admits that she did not.

The court thus finds that plaintiffs have met their burden of showing that service on Kelts by substitute service to 2329 Oak Park Lane was valid under CCP §415.20, and the motion to quash is denied.

As for the motion to set aside the default entered against her on 12/2/09, while the motion was filed within 6 months of entry of default and thus within the time allowed under CCP §473, Kelts has not provided the court with any evidence that her failure to answer was the result of mistake, inadvertence, surprise or excusable neglect, as required under the statute. The motion to set aside default is therefore also denied.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: AMC on June 18, 2010 .

(Judge's initials) (Date)

Tentative Ruling

Re: ***Haney v. Aguirre, et al***
Superior Court Case No. 07CECG03665

Hearing Date: June 24, 2010 (**Dept. 97A**) (continued for oral argument from June 10, 2010)

Motion: By plaintiff for order transferring him to Court for trial or alternatively for appointment of trial counsel

Tentative Ruling:

To deny.

Explanation:

While plaintiff has cited several authorizes for the position that the court has authority to order him to be transported to court for trial or to appoint trial counsel to represent him, each of the cases cited is distinguishable on its facts and the applicable law.

Apollo v. Gyaami (2008) 167 Cal.App.4th 1468, involved an appeal from a prisoner from a trial court order granting summary judgment in favor of a prison employee after plaintiff failed to appear through Court Call at the hearing. After reviewing the long history of plaintiff's aborted attempts to get the court to order the prison to allow him to appear by telephone, and the fact that the court granted the prison's motion without inquiring into whether plaintiff was voluntarily absent from the hearing.

Here, the court is fully aware of the plaintiff's right to have meaningful access to the court and has taken pains to insure that he has notice of each court hearing, access to the court's tentative rulings, and the ability to appear telephonically at those hearings before the tentative rulings have been adopted.

Price v. Johnston (1948) 334 U.S. 266, was a federal habeas corpus case in which the Supreme Court held that a prisoner should have been brought to court to argue his habeas corpus petition. But the rules applicable to habeas corpus petitions are not the same as those applicable to civil trials in state courts.

Pennsylvania Bureau of Corrections v. US Marshals Service (1985) 474 US 34, was a case that held that in the absence of an express finding of exceptional circumstances, neither a magistrate nor a district court had authority to order the U.S. Marshals to transport state prisoners to the federal courthouse to testify in an action brought by a state prisoner under 42 U.S.C.S. § 1983 against county officials. That case does not help plaintiff here.

US v. Hayman (1952) 342 US 205 was a criminal case in which the court held that the trial court should have held a hearing on a prisoner/defendant's motion to disqualify his counsel. The law applicable to criminal cases and a defendant's right to both a timely trial and appointed counsel are clearly different than the rights related to the right to prosecute a civil case for damages.

Penal Code §2601(d) guarantees California prisoners the right "to initiate civil actions, subject to a three dollar ($3) filing fee to be collected by the Department of Corrections," a right not at issue here.

And 28 USC §2241(c)(4) provides that "the writ of habeas corpus shall not extend to a prisoner unless…it is necessary to bring him into court to testify or for trial." But this is a motion in a civil trial that plaintiff initiated in state court, not a habeas petition where his liberty is at issue.

Plaintiff has cited no authority for a court to order a state prison to transport a prisoner to a different county to appear at a civil trial in which the prisoner is the plaintiff. And while there have been several cases, including **Yarbrough v. Superior Court** (1985) 39 Cal. 3d 197 and ***Wantuch v. Davis*** (1995) 32 Cal.App.4th 786, that have suggested that appointment of counsel might be one of the options a court could consider, neither identified how appointed counsel would be paid for the representation, and there is no authority for a court to order an attorney to represent a civil litigant without compensation.

And while it does seem unfair for defendants to argue that the trial should not proceed through videoconferencing based on their right to confront their accusers, while at the same time it is defendants' employer that is refusing to voluntarily transport him, even if the court were inclined to order the trial to proceed through videoconference, it does not appear that the Court has the equipment or personnel available to exercise that option.

Plaintiff's motion will therefore be denied.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: AMC on June 8, 2010 .

(Judge's initials) (Date)

Tentative Ruling

Re: ***Merkel v. Coalinga-Huron Recreation & Park District***
Superior Court Case No. 09CECG01445

Hearing Date: June 24, 2010 (**Dept. 97A**)

Motion: By plaintiff for reconsideration of order for appointment of discovery referee

Tentative Ruling:

To reconsider the May 18th order on the court's own motion but to require additional evidence on the issue of plaintiff's financial ability to pay a pro rata share of the cost

Explanation:

It does appear that the "new facts and circumstances" on which plaintiff relies could have been presented at the time of the May 18th hearing, thus unless plaintiff can provide a satisfactory explanation of why they weren't presented earlier, he is not entitled to "move" for reconsideration under CCP §1008(a). See ***Gilberd v. AC Transit*** (1995) 32 Cal.App.4th 1494, 1500; ***Garcia v. Hejmadi*** (1997) 58 Cal.App.4th 674, 690.

While plaintiff claims in the reply that the issue of financial ability to pay wasn't raised at the hearing because his attorney didn't have an opportunity to speak with him beforehand, Mr. Oren hasn't explained why he didn't at least raise the issue and ask for more time if he "suspected" that his client might not be able to pay.

However it also appears that there was no specific finding at the time the order was made, either "that no party has established an economic inability to pay a pro rata share of the referee's fee or a finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee," as required by CCP §639(d)(6)(A).

The court will therefore reconsider its prior order on its own motion, under its inherent powers. See ***Le Francois v. Goel*** (2005) 35 Cal.4th 1094, 1107.

As for whether the court can, based on the information currently before it, make the required finding concerning ability to pay, while plaintiff has offered a declaration under penalty of perjury claiming an inability to pay based on various listed factors, he has offered only general information, and given his admission that he is currently earning $73,000/year, as well as defense counsel's claim (not

supported by admissible evidence) that plaintiff may own property in Florida, it seems reasonable to require more specific information before making a determination that he is not able to pay his share.

Specifically, the court will require plaintiff to submit (under seal), a completed fee waiver application since that Judicial Council form (which is considered confidential and regularly placed in a sealed envelope in the file) asks most of the relevant questions the court would need to determine financial inability.

Plaintiff can obtain a copy of the Judicial Council fee waiver form on line at www.courtinfo.ca.gov/forms/documents/fw001.pdf. Page 1 (except for #1 and 2) is not relevant here since he isn't claiming to be on public assistance or to have income below the limits listed in ¶6(b).

But page 2 is highly relevant since it asks for monthly income, take-home pay, any other monthly income he might be receiving besides salary (such as renal income, interest, dividends, etc.), other income earned by someone in his household (e.g. his wife), any property (including real estate) he might own, and his monthly expenses (including the amount of rent he's paying).

The court will permit plaintiff to fax a copy to his attorney to bring to the hearing if he's not able to be here to sign it in person. That will allow him to complete it after this tentative ruling is issued, so a decision won't need to be delayed. And the court will honor plaintiff's request that the information be provided under seal, since this form is on its face marked "confidential" and is generally filed under seal.

Once the court reviews the form, it will decide if a finding can be made that no party has an economic inability to pay. If it makes such a finding, it will leave the order for a discovery referee in place because the attorneys in this case have both demonstrated an inability to resolve their disputes through a good faith effort to meet and confer.

But if it can't make that finding, then a reference is only authorized if defendant is willing to pay plaintiff's share of the fees. If not, the court will vacate the May 18th order and allow the parties to calendar any discovery motions they believe cannot be resolved through a good faith effort.

But it will admonish both sides that in connection with any motion that is calendared, the court is authorized to sanction any party who it finds did not make a reasonable attempt to resolve the issues without court intervention.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary.

Tentative Ruling

Issued By: AMC on June 18, 2010 .

(Judge's initials) (Date)

03

Tentative Ruling

Re: ***TFS Investments, LLC v. Hedrington***
Case No. 09 CE CG 04745

Hearing Date: June 24th, 2010 (Dept. 97A)

Motion: Plaintiff's Motion to Have Matters Deemed Admitted and to Compel Responses to Form Interrogatories and Request for Production of Documents, and for an Award of Monetary Sanctions

Tentative Ruling:

To grant the motion to compel defendant Orlonzo Hedrington to provide responses to the form interrogatories, set one, and request for production of documents, set one, served on defendant on April 13th, 2010. (CCP §§ 2030.290; 2031.300.) Defendant shall provide verified responses without objections within 10 days of the date of service of this order.

To grant the motion to deem the truth of the matters in the requests for admissions, set one, to be admitted. (CCP § 2033.280(b).) The court notes that defendant has now filed what purport to be responses to the requests for admission. However, the responses are unverified, are not in the correct format, and fail to admit or deny the matters in the requests for admission. Therefore, the responses are legally insufficient, and the court intends to disregard them. (CCP §§ 2033.220; 2033.240.)

To grant the request for monetary sanctions for defendant's willful failure to respond to the discovery requests, in the amount of $265.00. Defendant shall pay monetary sanctions to plaintiff's counsel within 30 days of the date of service of this order.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: _____AMC_____ on _June 21, 2010_____.
(Judge's Initials) (Date)

(19) **Tentative Ruling**

Kalmbach v. Sportsmobile West
07CECG02071 consol/w 08CECG02981

Hearing Date: June 24, 2010 **(97D)**

Motion: by plaintiff to compel deposition of Custodian of Records for Evans HR Group and production of documents thereat

Tentative Ruling:

To grant, finding a waiver of the attorney client privilege as to all documents responsive to the subpoena attached as Exhibit A to the Oren Declaration attached to the moving papers, on the grounds no objection appears in the affidavit of the custodian of records attached as Exhibit B to the same.

To find that the person presented for deposition did not qualify as the custodian as he was unable to testify as to whether or not the documents produced were responsive, having never seen the deposition subpoena and having no knowledge of its contents. Ms. Evans or a qualified custodian must appear for deposition on or before August 15, 2010 with all responsive documents other than those created after May 26, 2009. If there are documents created after that date that are at issue, a privilege log shall be provided at the time of the deposition so that counsel may inquire into the propriety of assertion of the privilege.

Sanctions of $863.40 shall be paid by the deponent to plaintiff's counsel.

Explanation:

Evidence Code section 1561 notes that a custodian must be able to testify to "each of the following . . . all the records described in the subpoena duces tecum . . . were delivered . . ." The transcript of Mr. Rylant's deposition amply demonstrates he was not qualified to testify as to the production of records responsive to the subpoena, having been unaware of the requests in the subpoena.

Representations by counsel are insufficient, as counsel cannot testify for a client's personal knowledge. Lawyers cannot testify for their clients or authenticate purported documents of the client. Brown & Weil, Civil Procedure Before Trial, § 10:115 - 10:116; *Norcal Mutual Ins. Co. v. Newton* (2000) 84 Cal. App. 4th 64, 72, fnt. 6; *Cullincini v. Deming* (1975) 53 Cal. App. 3d 908, 914; *Maltby v. Shook* (1955) 131 Cal. App. 2d 349, 351-352, and *Rodriguez v. County of LA* (1985) 171 Cal. App. 3d 171, 175.

While this Court has ruled that certain items are privileged, it does not necessarily follow that the privilege has not been waived. The record shows no objection to the request for these documents made via subpoena in 2009. Any privilege for documents in existence on May 26, 2009 is therefore waived by virtue of Evidence Code section 912(a), which states in the pertinent part (emphasis added):

> "[T]he right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure***, including failure to claim the privilege*** in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

The amount of sanctions sought are reduced because 1) meet and confer time is not compensable and 2) the work of paralegals or law clerks is not attorney work and therefore not compensable as attorney's fees. Such expenses are part and parcel of office expenses, akin to secretarial expenses. A professional legal secretary is certainly no less an asset than one with a paralegal certificate. See *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal. App. 4th 1095; *Ripley v. Pappadopoulos* (1994) 23 Cal. App. 4th 1616, 1624; *First Nationwide Bank v. Mountain Cascade* (2000) 77 Cal. App. 4th 871, 876-877- rejecting earlier contrary authority. The amount of the hourly fee charged by plaintiff's counsel is adequate to cover such expenses.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-23-10 .
(Judge's initials) (Date)

(19) **Tentative Ruling**

Kalmbach v. Sportsmobile West
07CECG02071 consol/w 08CECG02981

Hearing Date: June 24, 2010 **(97D)**

Motion: by defendants to compel plaintiff "to supply non-evasive responses and documents"

Tentative Ruling:

To grant as to the questions listed in the separate statement under headings for Deposition Question Nos. 1, 2, 5, 6, and 9; to deny as to the others.

As for Document Dispute No. 1, to order that plaintiff review all email accounts to which he has access for responsive materials to document requests Nos. 6-11 and 22-27, and provide a written response and production in accord with the requirements of Code of Civil Procedure sections 2031.210 through 2031.250, under oath, by August 3, 2010. To deny as to the rest without prejudice to a demand for the specific documents requested under Code of Civil Procedure Section 2031.010 et seq.

Plaintiff shall make himself available for deposition on these issues on or before August 17, 2010. All requests for sanctions are denied. Each party shall submit papers on the subject of deeming this case complex by June 28, 2010, for consideration at the July 1, 2010 discovery hearing.

Explanation:

1. Introduction

In response to the deposition queries and demands for documents at issue in this motion, plaintiff has generally objected on the basis of irrelevancy and privacy. The proponent of discovery of constitutionally protected material has the burden of making a threshold showing that the evidence sought is directly relevant to the claim or defense. *Harris v. Superior Court* (1992) 3 Cal. App.4th 661, 666; *Britt v. Superior Court* (1987) 20 Cal.3d 859, 862; *Davis v. Superior Court* (1992) 7 Cal. App.4th 1008, 1018. Claims of tangential relevancy are to be weighed closely with objections on the basis of the constitutional right of privacy.

2. Deposition Questions Nos. 1 and 2

Two issues in this lawsuit are the claims by plaintiff of emotional distress arising from financial hardship and plaintiff's financial ability to exercise stock options he alleges were owed to him. The queries set forth in the parties' separate statements as Deposition Questions Nos. 1 and 2 seek information about discussions with a certain individual over loans of significant amounts of funds for the purpose of investment by plaintiff (and perhaps others) in defendant Sportsmobile.

While the arguments such information may lead to a showing of lack of loyalty by plaintiff to the company are unconvincing, the information is directly relevant to the financial hardship and ability to exercise stock options issues. The motion is granted as Deposition Questions Nos. 1 and 2.

3. Deposition Questions Nos. 3 and 4

Deposition Questions Nos. 3 and 4 reference an Exhibit which is not in the record before the Court, and the motion is denied as to these as the record fails to show any relevance to an issue in this action, and therefore no basis on which to overrule the privacy objection.

4. Deposition Question No. 5

Deposition Question No. 5 asks for the name of the person to whom a certain phone number belongs, a phone number that plaintiff called during his work hours with Sportsmobile. The U.S. Supreme Court recently ruled that text messages sent via work-issued cellular telephones involved no privacy interest and could be reviewed at will by the employer. *City of Ontario v. Quon* (2010) 2010 U.S. LEXIS 4972, Supreme Court Case No. 08-1332. A phone call during work hours would generally be a use of employee time which the employee has agreed belongs to the employer. The Court grants the motion as to Deposition Question No. 5.

5. Deposition Questions Nos. 6, 7, and 8.

Deposition Question No. 6 asked how much plaintiff had in savings. Such question does involve private information, and "The scope of either a statutory or implied waiver is narrowly defined and the information required to be disclosed must fit strictly within the confines of the waiver." *Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal. App. 3d 1047, 1052.

"When an individual's right of privacy in his financial affairs conflicts with the public need for discovery in litigation, the competing interests must be carefully balanced. Even where the balance weighs in favor of disclosure of private information, the scope of the disclosure will be narrowly circumscribed; such an invasion of the right of privacy must be drawn with narrow specificity and is permitted only the extent necessary for fair resolution of the lawsuit." *Moskowitz v. Superior Court* (1982) 137 Cal. App. 3d 313, 316, which was followed in *Schnabel v. Superior Court* (1993) 5 Cal. 4th 704, 714. The plaintiff in that case had also made an allegation of financial difficulty, as plaintiff has here.

The bare amount of savings possessed by plaintiff is a minimal intrusion into his financial privacy, and is directly relevant to the question of his emotional distress arising out of financial hardship, as well as his ability to exercise the stock options. The Court grants the motion as to Deposition Question No. 6.

In contrast, Deposition Question No. 7 seeks income figures from a particular source – plaintiff's wife. This is a far more intrusive question. The sources of household income for plaintiff are not an issue in this case; only his overall ability to avoid financial hardship and to exercise stock options are issues.

That is also true of Deposition Question No. 8, which asks why plaintiff did not borrow money from a particular individual. This query fails to satisfy the "narrow specificity" requirement set forth by case law. The motion is denied as to Deposition Questions Nos. 7 and 8.

6. Deposition Question No. 9.

This query seeks to discovery the amount paid by plaintiff to a consultant, a consultant who was actually involved in negotiations with defendants on plaintiff's behalf. Plaintiff urges that the fact of payment is all that should be permitted at trial, but that is a motion in limine, not a discovery objection. Failure to admit financial bias information has been the basis for reversal of several judgments on appeal See *People v. Easley* (1988) 46 Cal. 3d 712 - Supreme Court unanimously reversed a death penalty judgment because it was not offered. See also *Calvert v. State Bar* (1991) 54 Cal. 3d 765, *People v. Brown* (1955) 131 Cal. App. 2d 643, and *Pierson v. Holly-Coleman Co.* (1960) 178 Cal. App. 2d 373.

Relevancy cannot be questioned where admissibility is already decreed by our state law. *Glenfed Development Corp. v. Superior Court* (1997) 53 Cal. App. 4th 1113, 1117-1118.

The Court grants the motion as to Deposition Question No. 9.

7. Document Issue No. 1

Plaintiff admitted at his deposition that he had not bothered to look for emails which might be responsive to document requests made along with the notice for his deposition. Yet there were objections made on the basis of privacy and relevancy to those requests. In *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, the Court of Appeal upheld a jury instruction as to suppression of evidence where a party had objected to discovery of a personnel file which the party did not review prior to making the objections.

The Court orders that plaintiff review all email accounts to which he has access for responsive materials to document requests Nos. 6-11 and 22-27, and provide a written response and production in accord with the requirements of Code of Civil Procedure sections 2031.210 through 2031.250, under oath, by August 3, 2010.

8. Document Issues Nos. 2, 3, and 4

The motion is denied as to these issues, as the discussion of documents and the document requests are insufficiently specific to show there has been any misconduct. Defendants are free to make a specific request for the specific documents they desire via a future discovery device.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

9. Housekeeping Issues

The smooth progress of this case has been hampered by the failure of defendants to provide conformed copies of their filings to the Court. Where there are, as is true recently in this case, multiple motions within days or weeks of each other, the Court's file frequently travels between the filing window, the Courtroom, the Court's Archives' facility, and other parts of the court system. For Example, there is a summary judgment motion pending on July 20, 2010, but the Court has no papers on that matter as yet.

The number of law and motion proceedings and witness issues in this case indicate to the Court that it is likely proper for a complex case designation. The parties are ordered to file papers on or before June 28, 2010 on that subject, which will thereafter be addressed at the July 1, 2010 discovery motion hearings.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-22-10 .

(Judge's initials) (Date)

Tentative Ruling

Re: ***Tetra Tech EM, Inc. v. Bioenergy Solutions, LLC, et al.***
Case no. 09CECG00107

Hearing Date: **June 24, 2010 (Dept. 97C)**

Motion: By plaintiffs for summary adjudication of the breach of contract cause of action

Tentative Ruling:

To grant pursuant to California Code of Civil Procedure (CCP) sections 437c(o)(1), 437c(p)(1), and 437c(b)(3), and California Rules of Court (CRC) rules 3.1350(e)(1), (e)(2), and (e)(3).

Explanation:

Court records do not reflect that defendants have filed with the court or served on plaintiffs a separate statement of disputed facts in opposition to the present motion, or evidence in opposition, or an opposing memorandum of points and authorities. CCP section 437c(b)(3) and CRC rules 3.1350(e)(2) and (3) require a separate statement, and evidence in opposition. Also, CRC rule 3.1350(e)(1) requires a memorandum in opposition. Failure to comply with the requirement of an opposing separate statement constitutes a sufficient ground for granting a motion for summary judgment. (*Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 734-735.) Thus, the court need not provide a specification of evidence when summary judgment is granted as a sanction for failure to file a separate statement of disputed facts. (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 960-961.) However, the court may not grant the motion unless it first determines that the moving party has met its initial burden of proof. (*Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085-1086.)

The separate statement, declaration of Mr. Nichols, and supporting evidence together demonstrate that, under CCP section 437c(o)(1), plaintiffs meet their burden of persuasion in proving each element of the breach of contract cause of action, and hence that there is no defense thereto. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850; and *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal. App. 4th 1171, 1178.) Plaintiffs meet their burden in showing that there is not triable issue as to any material fact for the cause of action at issue. (*Atlantic Richfield Co., supra*, 25 Cal. 4th at 843. [Citation omitted.]) Because plaintiffs meet their burden of production, the burden shifts to defendants to make a prima facie showing of the existence of a triable issue of material fact. (*Id.* at 850.) Accordingly, the court grants the motion for summary adjudication of the breach of contract cause of action.

Pursuant to CRC rule 3.1312, and CCP section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **A.M. Simpson** (Judge's initials) **on** **6-21-10** (Date).

(19) **Tentative Ruling**

In Re Jason Perez
10CECG01393

Hearing Date: June 24, 2010 **(97D)**

Motion: by Washington Square Financial for approval of transfer of structured settlement payments

Tentative Ruling:

To deny without prejudice to filing of an amended petition which meets the requirements of the Structured Settlement Transfer Act (Insurance Code section 10134 et. seq.) and the concerns set forth below, on or before July 30, 2010, with a new hearing date of August 26, 2010 at 3:30 p.m. in Department 97D. If an amended petition is not filed, the matter will be dismissed.

Should there be any objection to the Court's finding that the payee's financial information to be filed if an amended petition is presented shall be filed under seal, that objection must be filed with this Court and served on all parties no later than July 20, 2010.

Explanation:

The petition must be denied for a number of reasons. First, the statute requires that the Court make certain findings and that certain evidence be provided. Here, the affidavit of Mr. Mitchell is not executed under penalty of perjury of the state of California, and it therefore provides no evidence on which to make any of the required findings. See *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal. 4th 601 and Code of Civil Procedure section 2015.5. Mr. Mitchell statements also are not supported by any foundation as to his personal knowledge of the facts related, or reference to other admissible evidence (such as about the conditions of insurers, or why he thinks that the insurers notified are successors to the ones listed in the annuity and settlement agreement). Evidence Code sections 403 and 702 require such, and impose the burden of proof on the proponent to lay a foundation for personal knowledge.

The instant petition also contains no verification by the petitioner that the requirements of Insurance Code sections 10136, 10137, and 10138 have been met – as required by Insurance Code section 10139(a). No copy of the annuity has been provided. There is only a certificate of coverage under the annuity contract, which itself contains a careful notation that it is not the annuity and cannot take the place thereof. The annuity contract is required as part of the petition. See Insurance Code section 10139.5(c).

That section also requires information about the payee's family, wife and children, where they live, if there is a separation, etc. The actual amount of the payee's income and its sources is required by Insurance Code section 10139.5(c)(4), and whether or not the payee has child or spousal support orders out there and their provisions if they do exist (subsection (c)(5) must also be disclosed. It is further required that information about prior transfers and attempts to transfer be set forth, including why the payee made prior attempts. See Insurance Code section 10139.5(c)(6). None of this information was provided here.

Mr. Perez' handwritten date on the disclosure shows he got it two days after the supposed date of the transfer agreement. His signature on the agreement is in fact the same day as his acknowledgment of the disclosure form and the date his declaration was signed. The law requires that the disclosure be provided 10 days prior to any signature on the transfer agreement. See section 10136(b).

There is no evidence from any party indicating that the insurance companies served are proper. Such companies are not listed in the documents constituting the certificate, qualified assignment, or the release appearing as part of Exhibit C to the petition. While Mr. Mitchell has some discussion of general problems with insurer solvency, he has not provided any basis on which to be concerned about the insolvency of the insurers on which the petition was served. This renders the talk of why a transfer of a payment in a transaction akin to an 18% loan is a fair deal due to risk to be unsupported as well.

The qualified assignment was expressly agreed by Mr. Perez' then guardian to be subject to Michigan law, and it forbids the sale of the payments by Mr. Perez. While California law is to the contrary (see, e.g., *321 Henderson v. Sioteco* (2009) 173 Cal. App. 4th 1059), an agreement to use law of another forum which might have different views cannot be ignored in determining the ability of Mr. Perez to make this sale. California honors choice of law provisions except where they violate fundamental public policy. See *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148.

The contract language found in the transfer agreement raises considerable questions as to whether or not Mr. Perez will derive any benefit from this transaction. It essentially gives the company unfettered discretion to determine when or if will provide the heavily discounted purchase price to Mr. Perez, who has only 16 months to wait before receiving the entire $100,000 due him in November of 2011. Even should the factoring company pay Perez on the hearing day, he would be losing approximately $1,625.00 a month by taking the lower payment. While Mr. Perez hopes his credit will be improved, the transfer agreement also permits the factoring company to file a UCC-1 Financing statement, which seems likely to create the appearance of a loan for which the annuity payment is collateral – the appearance of a debt in the amount of the payment, rather that the asset it is.

Certainly the Court is sympathetic to a desire to bring loan payments on a home current, and to get better credit terms. However, there is no concrete evidence of a home loan payment issue, and given the fact that the $100,000 is due in 16 months, substantial evidence that the home lender would foreclose rather than wait or modify would be necessary in order for this Court to find that this transaction was fair and reasonable or in the best interests of Mr. Perez.

Given that Mr. Perez signed his declaration in February, four months ago, it may well be that the circumstances under which he sought to sell his last remaining annuity payment have changed. Certainly seeking the equivalent of an 18% interest loan in order to get money to get a lower home mortgage interest rate makes no sense, nor does the desire to pay off another secured loan (the auto) for which an 18% or higher interest rate would be surprising.

This petition is denied, but without prejudice to filing an amended petition which includes a further declaration from Mr. Perez (to be filed under seal) providing:

1) The closing statement for purchase of the home in question;
2) 12 months of statements from the home mortgage company or companies showing payments and amounts due, including late fees;
3) 12 months of pay stubs from Mr. Perez' employer, with all information about tax deductions redacted;
4) 12 months of statements on the automobile loan;
5) any correspondence between Mr. Perez and his mortgage lenders;
6) a discussion of Mr. Perez' marital status, children, and the other facts required by Insurance Code section 10139.5(c)(2) through (5)
7) A discussion of the prior attempts to transfer part of the payment in question, including why the last sale was cancelled, and a discussion of how Mr. Perez' circumstances as related in the prior petitions changed;
8) 12 months of bank or credit union statements for any account in which Mr. Perez has an interest;
9) the annuity contract itself (not just the certificate);
10) any statement of pension plan holdings issued in the past 12 months;
11) any documents which discuss the ability to borrow from such plan and
12) a current credit report.

Should petitioner choose to file an amended petition, it must provide admissible evidence of the status of the insurers on the original documents, proof that the ones now listed in the proof of service are the successors, and a declaration from an actuary as to the solvency of each, based on public records available (such as ratings and annual statements filed with state regulatory bodies).

The Court also would need points and authorities from the factoring company on the effect of the choice of Michigan law in the qualified assignment to conclusion of this transaction, the state of Michigan law with regard to transfer of structured settlement payments (statutory and case law), as well as why petitioner could truthfully file a UCC-1 financing statement where there was a sale transaction rather than a loan.

The lack of any date on which petitioner is required to make payment to Mr. Perez is a significant factor in the Court's decision to deny the instant petition. If petitioner continues to require approval of the transaction from persons or entities other than Mr. Perez, then petitioner must also file declarations as to their approval with the amended petition.

The Court also notes that failure by Mr. Perez to take advantage of the ability to consult independent advisors paid by the factoring company under these circumstances is a factor which weighs against a finding that he is making a decision in his best interests.

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DRF on 6-23-10 .

(Judge's initials) (Date)

Tentative Ruling

(RA#24)

Re: ***Pamela Trujillo, et al. v. Kate Aspen, Inc., et al.***
Court Case No. 09CECG03203

Hearing Date: **June 24, 2010 (Dept. 97D)**

Motion: 1) Motion to Compel Responses to Demand for Inspection and Copying of Documents Propounded to Plaintiffs, Individually and Separately

2) Motion to Compel Responses to Form and Special Interrogatories Propounded to Plaintiffs Individually and Separately

Tentative Ruling:

To deny without prejudice.

Explanation:

There are several technical problems with the motions, mandating their denial.

- The moving papers were not filed timely, since they were filed on June 14, 2010, which is only 7 court days before the hearing (not counting June 16, 2010, which was a court closure day). [See CCP §1005(b) and CRC 3.1300(a)—papers must be filed at least 16 court days before the hearing, unless an order shortening time is granted]

- There is no proof of service attached to the moving papers to indicate that proper and timely notice was given. [CCP §1005(b) and CRC 3.1300(a)—papers must be served at least 16 court days, plus 5 calendar days for service by mail within the State, before the hearing] The court notes that it *appears* that moving party has at least attempted service, but if this is the case, it is defective. The proposed Orders *lodged* (i.e., not filed) by moving party have what purport to be proofs of service attached to them, indicating service of the motions on Plaintiffs on May 21, 2010 but these are insufficient, for the following reasons:
    - The declaration as to each proof of service indicates that the declarant served "the foregoing documents," which documents are not the motions referred to, but are instead the proposed (and unfiled) orders.
    - The file reflects that on or about May 26, 2010, the clerk of the court returned documents described as "Notice of Motion to

Compel" [presumably referring to these motions] to the moving party, apparently due to an error as to the Title of the case. Obviously, any *corrected* papers filed by moving party after this date would have had to be re-served on plaintiffs, and served and filed timely, as well. Thus, even if the proofs of service attached to the Proposed Orders were merely attached to the wrong documents (which the court might find to be a *de minimus* error, if that was the only thing wrong with it), these proofs of service clearly refer to the documents *returned by the clerk*, and not the motions *as filed.* That is not a *de minimus* error, since there is no way of knowing how the rejected documents differ from the motions filed. Given that no opposition has been filed, there is no indication that plaintiffs have been given due notice of these motions.

- The Declarations of counsel in support of each motion refer to various exhibits which are not attached to the declaration. It appears that these documents may be incorrectly attached to the Proposed Orders. As with the motions themselves, this casts doubt as to what was actually served on Plaintiffs.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DRF on 6-23-10 .
(Judge's initials) (Date)